

**Hawaii Teamsters and Allied Workers Union, Local 996, IBT and Kapiolani/Children's Medical Center & Hawaii Nurses Association. Case 37-CD-41**

24 February 1984

**DECISION AND DETERMINATION OF DISPUTE**

**BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER**

The charge in this Section 10(k) proceeding was filed 19 August 1983 by the Employer, alleging that the Respondent, Hawaii Teamsters and Allied Workers Union, Local 996, IBT, herein called Local 996, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Hawaii Nurses Association, herein called HNA. The hearing was held 19 September 1983 before Hearing Officer Edward J. Parnell.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

**I. JURISDICTION**

The Company, a Hawaii corporation, is engaged in the provision of acute care specialty services in obstetrics, gynecology, and pediatrics at its facility in Honolulu, Hawaii, where, in calendar year 1982, it received total revenues in excess of \$1 million. During the same period, it purchased and received goods and materials valued in excess of \$1 million, directly or indirectly, from points located outside the State of Hawaii. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 996 and the HNA are labor organizations within the meaning of Section 2(5) of the Act.

**II. THE DISPUTE**

**A. Work in Dispute**

The disputed work, which was stipulated to by the parties, involves the assignment of second call for support personnel in the afterhours adult operating room at Kapiolani/Children's Medical Center.

**B. Background and Facts of Dispute**

The Employer operates a 260-bed medical facility in Honolulu, Hawaii. It is the only hospital in the State specializing in obstetrics, gynecology, and pediatrics. The HNA represents all registered nurses employed at the hospital. Local 996 represents employees in a service and maintenance unit which includes operating room technicians.

"Second call," the work in dispute, is an aspect of the Employer's staffing arrangement for the afterhours adult operating room at the hospital. Afterhours surgery involves "emergency" or "emergent" surgery; i.e., surgery that is performed in response either to a life-threatening situation or to a situation which, while not potentially fatal, requires immediate attention. When off-duty employees are "on call," they are required to be available on a standby basis for duty in the operating room.

The Employer has traditionally utilized two employees for its oncall schedule. For at least the last 12 years, registered nurses qualified in operating room procedures have been formally designated, and exclusively used, for first call pursuant to a requirement of the Joint Commission on Accreditation of Hospitals. Registered nurses on first call receive a standby wage differential, currently \$2.50 per hour. Prior to March 1982, the procedure for second call was informal and not limited to registered nurses: a list of qualified registered nurses would be consulted; if none of the nurses was available or willing to serve on second call, an available operating room technician would be called in. There was no standby pay differential for second call.

In March 1982, the Employer decided to formalize the second call designation. This decision was necessitated by two occurrences. First, a complaint was made by a surgeon following an operation in the afterhours adult operating room: the surgeon had been unable to get either a registered nurse or an operating room technician to serve on second call. Second, the afterhours operating room location was moved to an area of the hospital where support personnel from other departments were not readily available in the event of an unforeseen emergency. The Employer determined that, for reasons of economy and efficiency, the employees to be formally designated for second call would be registered nurses, not operating room technicians. This matter was bargained with the HNA; it was agreed that the new formal second call status would be supported by a wage differential equal to that for first call.

When the new second call procedure was implemented in March 1982, the union then representing

the operating room technicians, the United Public Workers, did not file a grievance. In July 1982, Local 996 displaced the UPW as the bargaining representative of the technicians. In subsequent contract negotiations the Employer, for reasons which are not satisfactorily explained in the record, agreed to give second call, with a wage differential of \$2 per hour, exclusively to the operating room technicians. This latest second call procedure was included as a part of the collective-bargaining contract signed in December 1982; the Employer implemented the procedure in January 1983.

The HNA filed a grievance concerning its loss of second call designation, and the grievance proceeded to arbitration. In May 1983, the arbitrator issued a decision awarding second call to the registered nurses exclusively, as required by the agreement between the HNA and the Employer in March 1982. Local 996 did not participate in the arbitration hearing, and the arbitrator's decision did not formally consider the effect of Local 996's agreement with the Employer in December 1982. In compliance with the arbitration award, the Employer switched back to utilizing registered nurses exclusively in August 1983.

#### C. Contentions of the Parties

The Employer and the HNA contend that the Employer is contractually bound by its March 1982 agreement to utilize registered nurses for second call. The Employer further contends that the use of registered nurses for second call is supported by the superior skills of registered nurses, by greater efficiency and economy of operation, and by its own preference.

Local 996 contends that the Employer is contractually bound by its December 1982 agreement to use operating room technicians for second call. It further contends that, in threatening to picket the Employer's premises, it is lawfully enforcing its collective-bargaining contract with the Employer, and that, therefore, there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated. Local 996 finally contends that, even if it assumed that the Board has the jurisdictional authority to decide this dispute, the Board cannot resolve the matter properly without evidence of the practice of other hospitals in the area concerning off-hours operating room staffing procedures.

#### D. Applicability of the Statute

By letter dated 17 August 1983, Arthur Rutledge, president of Local 996, informed the Employer's director of personnel of the Union's intention to picket the Employer's premises due to the

Employer's assignment of second call work to the registered nurses.<sup>1</sup>

At the hearing, the Employer and Local 996 stipulated that there was no method agreed upon by all parties for voluntary adjustment of the dispute. While the HNA refused to join in this stipulation, it offered no evidence to demonstrate the existence of an alternative, voluntary resolution procedure which would be binding on all parties.

Based on the foregoing, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

#### E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

##### 1. Collective-bargaining agreements

As set out above, each of the Unions contends that the work in dispute is specifically covered by the terms of its agreement with the Employer. On review of the respective contracts and the surrounding circumstances, we find that both the registered nurses and the operating room technicians have valid contractual claims to the disputed work. Accordingly, we conclude that this factor favors assignment of the work to neither party; in effect, the conflicting contractual claims neutralize each other. *Iron Workers Local 8 (PPG Industries)*, 267 NLRB No. 122 (Aug. 26, 1983); *NLRB v. Graphic Arts Union No. 1P*, 600 F.2d 336 (2d Cir. 1979).

##### 2. Past practice

The record shows that, prior to March 1982, the Employer's theoretical procedure for assignment of

<sup>1</sup> We note Local 996's contention that its threat to picket for the purpose of enforcing its collective-bargaining agreement with the Employer is lawful activity, and therefore does not constitute reasonable cause to believe that Sec. 8(b)(4)(D) has been violated. However, we also recognize that the HNA's claim to the disputed work is at least as valid under the terms of its agreement with the Employer. Given these circumstances, we find that the reasonable cause standard has been met.

second call was to exhaust the list of available registered nurses before designating an operating room technician. In practice, it is apparent that the technicians often served on second call, as the listed registered nurses were frequently unavailable or unwilling to serve. After the Employer formalized the second call procedure, and added a pay differential, it utilized registered nurses exclusively from March 1982 until early January 1983. At that time, its agreement with Local 996 having been finalized, the Employer began to use the technicians exclusively for second call. In August 1983 the Employer, in implementing the arbitrator's directive, switched back to the exclusive use of registered nurses.

Based on these patterns, we find that, at first, the Employer's scheduling practice was not predetermined in favor of the registered nurses or operating room technicians; then, after March 1982, its practice swayed back and forth, depending on the labor-management exigencies of the moment. We conclude that the Employer's past practice does not favor an award of the disputed work to either party.

### 3. Area practice

Local 996 contends that the present dispute cannot be properly decided without consideration of the off-hours operating room staffing procedures in other hospitals in the area. However, it failed to offer evidence of such practice when given the opportunity at the hearing.

The Employer's position is that Kapiolani/Children's Medical Center offers specialized surgical facilities and services in obstetrics and gynecology, and that it has the only off-hours operating room in the State functioning on this basis. Under these circumstances, we agree with the Employer that no relevant evidence of area practice is available and, thus, it is not a factor in this proceeding.

### 4. Relative skills

Following comprehensive instruction, registered nurses are licensed by the State of Hawaii. After a special training course in surgical procedures, qualified registered nurses are assigned to the hospital's operating rooms. Their duties in relation to surgical care include the legal responsibility to account for surgical instruments, preoperative and postoperative evaluation of patients' status, administering drugs, IVs, and resuscitation, keeping patients' records, and generally ensuring a high quality of patient care.

Operating room technicians are given between 8 and 18 months of training, depending on the location of the training facility. Their duties do not in-

clude direct patient care. They are responsible for opening the operating room, arranging the proper instruments on the surgeon's tray, passing the instruments to the surgeon during an operation, and cleaning up the operating room following surgery.

In short, while a registered nurse is able to perform all the functions of a technician, the technician is not qualified to perform all the duties of a registered nurse in the operating room. We conclude that, in the area of relative skills, the registered nurses are clearly more qualified to meet the potential requirements of the work involved on second call.

### 5. Economy and efficiency of operations and the Employer's preference

There was uncontroverted testimony that the exclusive use of registered nurses on second call would tend to guarantee the most effective surgical care for patients in all situations. This is especially significant where, due to unforeseen circumstances, only one of the scheduled oncall employees appears for duty; the designation of two registered nurses tends to assure that at least one registered nurse will be present in the off-hours operating room.

The Employer's preference for the exclusive use of registered nurses is based on the analysis immediately above. The Employer's medical director stated at the hearing that the use of registered nurses is desirable because it provides the greatest flexibility of skills with the least number of necessary personnel.

We find that the factors of economy and efficiency of operation and the Employer's preference favor an award of the disputed work to the registered nurses.

### Conclusions

After considering all the relevant factors, we conclude that employees represented by the HNA are entitled to perform the work in dispute. We reach this conclusion relying on the relative skills of the two groups of employees, the Employer's preference, and economy and efficiency of operation. In making this determination, we are awarding the work to employees represented by the HNA, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

### DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Kapiolani/Children's Medical Center represented by Hawaii Nurses Association

are entitled to perform the assignment of second call for support personnel in the afterhours adult operating room at Kapiolani/Children's Medical Center.

2. Hawaii Teamsters and Allied Workers Union, Local 996, IBT, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Kapiolani/Children's Medical Center to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Hawaii Teamsters and Allied Workers Union, Local 996, IBT, shall notify the Regional Director for Region 20 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.